Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

(3)

No. 96 - 1773

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ASTORIA FEDERAL SAVINGS & LOAN ASSOCIATION,
Petitioner,

- against -

THE STATE OF NEW YORK and NEW YORK STATE DEPARTMENT OF FINANCE (JAMES J. WETZLER, COMMISSIONER OF TAXATION AND FINANCE) and THE CITY OF NEW YORK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

# BRIEF OF RESPONDENT CITY OF NEW YORK IN OPPOSITION

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## COUNTER-QUESTIONS PRESENTED

1. Where the Court below concluded that the statute in question never granted bondholders an exemption from franchise tax for the interest paid on the bonds, does this Court have jurisdiction to review that judgment, predicated solely upon construction of the statute since an independent and adequate state ground existed for the judgment?

2. Since the Court below determined that the statute, as originally enacted, never granted an exemption from franchise tax for the interest from certain bonds and, thus, that no bond covenant for such exemption existed, does the subsequent legislative clarification of such non-exemption constitute a retroactive repeal which can be said to violate any of the bondholders' due process rights?

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## STATEMENT OF THE CASE

### A. New York Supreme Court Proceedings

Plaintiff commenced this action by bringing a declaratory judgment action in New York Supreme Court, Nassau County, seeking a declaration that 1) Public Authorities Law § 1045-u.3, as originally enacted in 1984, exempts the interest on the bonds issued pursuant thereto from inclusion in the measurement of its New York State and City franchise taxes and 2) the 1991 amendments to Public Authorities Law § 1045-u.3 were unconstitutional (A-19-20)[1].

Plaintiff moved for summary judgment for the relief requested in its complaint and both the New York City and New York State defendants cross-moved for summary judgment declaring, *inter alia*, that the statute, though inartfully drafted, never exempted the interest from inclusion in the franchise tax base (A20-21).

By opinion dated August 29, 1994 (A-15-28), the Court (Segal, J.), denied plaintiff's motion and granted both the State and City defendants' motions and concluded, *inter alia*, that despite plaintiff's protestations to the contrary, the statute was "unclear and ambiguous as a result of inartful draftsmanship"and that non-exemption was "in accord with the legislative intent which is the key to statutory

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[1] Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix to the Petition for Writ of Certiorari filed by plaintiff.

construction" (A-26 & A-27). The Court noted, moreover, that "[n]o proof whatsoever has been adduced of any legislative intent to depart from 50 years of precedent which included the income paid by revenue bonds issued by a State public authority in the measure of a corporate bondholder's total net income for purposes of calculating the corporation's franchise tax obligation" (A-28).

The Court, having concluded that the statute as originally enacted provided no exemption, did not reach the allegedly unconstitutional effect of the subsequent amendments to the statute, which the Legislature had explicitly indicated was only intended to clarify the original enactment (A-15-27).

Thus, the Court issued its judgment predicated solely on an adequate and independent state ground, *i.e.*, its interpretation of the State statute in question.

**B. Appellate Division, Second Department, Proceedings and Decision**

On July 6, 1996, the Appellate Division, Second Department, unanimously affirmed the judgment below (A-1-14). The basis of its judgment is evident from its decision; it was predicated purely upon its construction of Public Authorities Law § 1045-u.3, which it found had never provided the alleged exemption.

After agreeing with the lower Court's assessment of the provision as "inartfully drafted", it found the statute ambiguous in numerous ways and looked to the legislative

history to aid in its construction. Based upon, *inter alia*, the expressed purpose of the enactment, *i.e.*, to finance local water and sewer districts through revenue as opposed to general obligation bonds, that the conclusion urged by plaintiff would yield a result "departing from several decades of established practice", and would conflict with other laws and render it unconstitutional, the Court agreed that the interpretation given by the New York State Department of Taxation and Finance and urged by the State and City defendants "is at once eminently rational and maintains the constitutionality of the State and City franchise tax laws," and must be upheld (A-12). The Court found, significantly, that the bonds issued pursuant to the statute in question "were not marketed on the basis of the unusual tax advantage asserted for them by the plaintiff" (A-10). It also noted that "plaintiff's rather lengthy delay in asserting its entitlement to the purported 'exemption' also serves to cast doubt upon its threshold argument that the 1984 statute is 'clear' and 'unambiguous' on its face" (A-13).

Having determined that the statute, as enacted in 1984, never granted the exemption, the Court expressly recognized that there was no need to address plaintiff's constitutional arguments regarding the 1991 amendment. Nonetheless, the Court took pains to point out that, not only did the 1991 rewrite of Public Authorities Law § 1045-u.3 merely clarify the 1984 enactment, but, even if, *arguendo*, it retroactively eliminated an existing exemption, none of plaintiff's due process rights were abridged (A-12).

Plaintiff appealed as of right to the Court of Appeals. The Court of Appeals dismissed the appeal, *sua sponte*, on the ground that no substantial constitutional question is directly involved (A-29). Plaintiff then moved for leave to appeal to that Court; its motion was denied (A-30).

## REASON FOR DENYING THE WRIT

## THE JUDGMENT RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The writ should be denied because plaintiff has failed to establish a jurisdictional basis for the appeal pursuant to 28 U.S.C. § 1257(2). Review is inappropriate because the decision of the highest court of the State in which a decision may be had, the Appellate Division, Second Department, was predicated on a clear and express independent and adequate state ground, *i.e.*, the interpretation of an ambiguous New York State statute. Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993); R.A.V. v. St. Paul, 505 U.S. 377, 381 (1992); New York v. Ferber, 458 U.S. 747, 767 (1982); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

The construction given by the Court to the statute in question, Public Authorities Law § 1045-u.3, eliminated all the purported constitutional difficulties raised by plaintiff and that construction is authoritative. See, United States v.

Thirty-Seven Photographs, 402 U.S. 363, 368-369 (1970).

Plaintiff's presentation of its questions to this Court, irresponsibly and without warrant, suggest that both the New York State Legislature and the Courts below committed a fraud by, respectively, enacting the 1991 clarifying legislation and by interpreting the ambiguous statute as originally enacted in conformity with its obvious intent. As any reasonable reading of the decision below proves, this is not a situation where the courts have given the statute a narrow construction for the purpose of avoiding a federal challenge. See generally, Wright, Miller & Cooper, *Federal Practice & Procedure:Jurisdiction 2d* § 4026.

From the outset, the parties considered this case as one involving the construction of Public Authorities Law § 1045-u.3, plaintiff arguing that, by its plain language, an exemption for the interest from bonds issued pursuant to the statute existed, and, therefore, that the interest was not included in the measurement of the State and City franchise taxes; and defendants arguing that, inasmuch as the statute contained many ambiguities, the language was not plain and, therefore, resort to the legislative history was appropriate. Based upon that history, defendants continued, it was crystal clear that the statute provided no such exemption.

The Court agreed with defendants that the statute was anything but plain, citing several examples of the statute's patent ambiguities, *i.e.*, it appeared to exempt

bondholders from the imposition of real estate taxes on the bonds or their interest and to exempt the bonds and their interest from franchise taxes - two clear impossibilities (A-8-9). It continued its analysis by pointing out that the absolute legislative silence concerning the purported exemption of interest from inclusion in the measurement of the franchise tax, especially given that the grant of an exemption with respect to such bonds would constitute a departure from "several decades of established practice", strongly supports the argument that the Legislature never intended to grant the exemption (A-9). After scrutinizing the legislative history, the Court concluded that the statute never provided the exemption claimed by plaintiff and was intended only to "finance local water and sewer districts through revenue bonds as opposed to general obligation bonds"; and that the exemption related only to direct taxes, such as income taxes, and not to indirect taxes, such as franchise taxes (A-9-10). It found it significant that the bonds were "not marketed on the basis of the unusual tax advantage asserted for them by the plaintiff" and that plaintiff's claim for entitlement to the exemption came only after a "rather lengthy delay", undermining the claim that the exemption was clearly provided for in the statute (A-10, A-13).

Having determined that the statute never granted the exemption in 1984, when originally enacted, the subsidiary and contingent issues raised by plaintiff, *i.e.*, whether the 1991 clarifying legislation impaired a bond covenant and, thereby, violated the contract clause and amounted to a taking of property without due process, became moot. While the Court acknowledged this to be the case, it

nonetheless chose to address plaintiff's arguments (A12-13). It opined, in *dicta*, that there was no abridgement of plaintiff's due process rights wrought by the 1991 legislation's retroactive application to 1984, since it was not "harsh and oppressive" [citing to Welch v. Henry, 305 U.S. 134, reh. denied, 305 U.S. 675 (1938), and Canisius College v. U.S., 799 F.2d 18, 35 (2d Cir. 1986), cert. denied, 481 U.S. 1014 (1987)] (A12-13).

In sum, plaintiff's attempt to transmute a straightforward case of construction of a state statute into one with federal constitutional dimensions should be rejected.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

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